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G.F., Appellant)	
)	
and)	Docket No. 11-1175
)	Issued: November 21, 2011
U.S. POSTAL SERVICE, POST OFFICE,)	
Albany, NY, Employer)	
)	

Case Submitted on the Record

Before:
 RICHARD J. DASCHBACH, Chief Judge
 ALEC J. KOROMILAS, Judge
 JAMES A. HAYNES, Alternate Judge

On April 14, 2011 appellant filed a timely appeal of a March 25, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) that denied appellant's request for reconsideration because the request was untimely and did not demonstrate clear evidence of error. Because more than 180 days has elapsed between the most recent merit decision dated November 2, 2009 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3.

The issue is whether OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 5, 2009 appellant, then a 55-year-old letter carrier, filed an occupational disease claim alleging that he sustained pain, tingling and numbness while casing mail. He noted being aware of his condition since March 13, 2007.

In support of his claim, appellant submitted several medical reports which included a November 11, 2008 report from Dr. Mohan K. Sadana, a Board-certified plastic surgeon and treating physician, who noted appellant's chief complaint of pain in both wrists which appellant related began "about nine months ago and was usually movement related." Dr. Sadana further noted that appellant indicated that he had pain and discomfort while picking up objects and complained of "weakness of both hands and also numbness of both hands." He advised that appellant related that "working aggravates the pain and the patient drops objects." Dr. Sadana examined appellant and diagnosed bilateral carpal tunnel syndrome.

A December 5, 2008 sensory nerve conduction study (NCS) read by Dr. Vinodrai Parmar, a Board-certified psychiatrist and neurologist, revealed carpal tunnel syndrome.

In a decision dated November 2, 2009, OWCP found that appellant did not meet his burden of proof to establish his claim. It found that the medical evidence was not based on an accurate history and did not sufficiently address how appellant's diagnosed condition was related to his work duties.

On August 11, 2010 Dr. Sadana's office faxed OWCP a June 20, 2010 report from him, who noted that appellant was seen for the management of pain of both wrists and numbness of the fingers, left worse than right. Dr. Sadana noted that appellant's work involved repetitive movements of the wrists and fingers and that appellant had pain and discomfort of the wrists while at work and was dropping things out of his hands. Additionally, he advised that appellant's hands fell asleep while riding a bicycle. Dr. Sadana diagnosed bilateral carpal tunnel syndrome with left side moderate and recommended a release of the left carpal tunnel neurolysis and synovectomy. He opined that appellant had "a history of repetitive movements of the wrists and fingers at work and this is work related." Dr. Sadana's office also forwarded another copy of the December 5, 2008 NCS.

On January 4, 2011 appellant requested reconsideration and provided a copy of Dr. Sadana's June 20, 2010 report. He did not submit any arguments.

By decision dated March 25, 2011, OWCP denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA² vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”³

OWCP’s imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted it under section 8128(a).⁴ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought.⁵

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by it in its most recent merit decision. The reconsideration request must establish that OWCP’s decision was, on its face, erroneous.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁷ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise

² *Id.* at §§ 8101-8193.

³ *Id.* at § 8128(a).

⁴ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

a substantial question as to the correctness of OWCP's decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.⁸

ANALYSIS

In its March 25, 2011 decision, OWCP properly determined that appellant failed to file a timely request for reconsideration. It rendered its last merit decision on November 2, 2009. Appellant's January 4, 2011 letter requesting reconsideration was submitted more than one year after the November 2, 2009 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening his case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that OWCP's prior decision was in error.

The Board finds that appellant's January 4, 2011 request for reconsideration failed to show clear evidence of error. Appellant did not make any arguments. However, in support of his untimely request for reconsideration, he submitted Dr. Sadana's June 20, 2010 report in which Dr. Sadana noted appellant's work involved repetitive movements of the wrists and fingers, that he had pain and discomfort of the wrists while at work and was dropping things out of his hands. Dr. Sadana also noted that appellant's hands fell asleep while riding a bicycle. He repeated his previous diagnosis of carpal tunnel syndrome and recommended a release of the left carpal tunnel neurolysis and synovectomy. Additionally, Dr. Sadana opined that appellant had "a history of repetitive movements of the wrists and fingers at work and this is work related." While his report notes appellant's status and provides some support for causal relationship, this is insufficient to raise a substantial question concerning the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. Likewise the copy of the previously submitted NCS report, which was previously reviewed by OWCP, does not offer any information that raises a substantial question concerning the correctness of its decision.

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.⁹

Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review. On appeal, appellant disputed that his reconsideration request was

⁸ *Id.*

⁹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

untimely, as his physician, Dr. Sadana, submitted his report dated June 20, 2010. While the report was received on August 11, 2010, he did not request reconsideration from OWCP until January 4, 2011, which was more than one year after the November 2, 2009 merit decision, and was thus untimely.¹⁰ As discussed, Dr. Sadana's June 20, 2010 report is insufficient to establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

¹⁰ OWCP regulations provide that a request for reconsideration be sent by the employee (or representative) to the address as instructed by OWCP in the final decision. 20 C.F.R. § 10.606(a). The Board notes that OWCP's November 2, 2009 decision contained appropriate appeal rights along with instructions on how to exercise each appeal right.

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 21, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board